

ESTTA Tracking number: **ESTTA351821**

Filing date: **06/09/2010**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91190654
Party	Defendant Hidden Creations
Correspondence Address	SMITH, GAIL E. HIDDEN CREATIONS 1000 LINCOLN RD STE H # 123 YUBA CITY, CA 95991-6598 UNITED STATES hiddencreations@comcast.net
Submission	Other Motions/Papers
Filer's Name	Gail E. Smith
Filer's e-mail	gailhiddencreations@comcast.net
Signature	/s/Gail E. Smith/
Date	06/09/2010
Attachments	PDF Motion_to_Compel_6-7-10_FINAL__PDF_.pdf (36 pages)(146188 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Application Serial No. 77/520,947
Published in the *Official Gazette* on December 16, 2008
Mark: SHAKE-N-GROW

OMS Investments, Inc.)	
)	Opposition No. 91190654
Opposer,)	
)	APPLICANT’S MOTION TO
COMPEL		
)	OPPOSER’S ANSWERS TO
)	APPLICANT’S FIRST SET OF
)	INTERROGATORIES, FIRST
v.)	SET OF REQUESTS FOR
)	PRODUCTION OF
Hidden Creations)	DOCUMENTS, AND
)	REQUESTS FOR ADMISSIONS
Applicant.		

MOTION TO COMPEL

On April 30, 2010, Applicant HIDDEN CREATIONS filed Applicants First Set of Interrogatories, Applicants First Set of Requests for Production, and Applicants First Set of Requests for Admissions with Opposer, OMS Investments, Inc.

On May 3, 2010 Opposer, responded to Objections to Applicant’s First Set of Productions Requests, and Admissions and did not produce any documents. [Exhibit A]

On June 2, 2010, Applicant HIDDEN CREATIONS sent an email in “good faith” [Exhibit B] to Opposer, OMS Investment’s attorney Shannon King, requesting answers to Applicants First Set of

Interrogatories, Applicants First Set of Requests for Production, and Applicants First Set of Requests for Admissions” [Exhibit C] by Opposer, and the opportunity to met and confer within 7 days.

On June 4, 2010 in an email to opposer’s attorney King says to met and confer is a moot point since the deadline for the discovery is past. No mention of answering any of the questions regarding the Applicant from Opposer First Set of Interrogatories, Applicants First Set of Requests for Production, and Applicants First Set of Requests for Admissions with Opposer, OMS Investments, Inc.

Applicant HIDDEN CREATIONS moves for a Motion to Compel Opposer to comply with the requests in a timely manner and prays that the court will move:

1. Opposer’s be compelled to respond since the case has not be suspended.
2. Should the case be suspended, Opposer will in any event be required to answer the interrogatories, production requests, and admissions upon hearing at Federal civil proceedings *OMS Investments, Inc. and The Scotts Company LLC v. Gail Smith*, Case No. 2:10-CV-01037 currently pending in the United States District Court Eastern District of California.

Applicant has answered all of Opposers requests completely and in good faith. Therefore, the same is being requested of Opposers.

Applicant opposes to Opposers objections served on May 3, 2010 as said discovery requests are relevant, and necessary to Applicant’s ability to validate Opposer’s claims.. The Board should exercise its discretion in this proceeding by ordering the Answers to the Requests etc. as prayed for herein.

Date: June 8, 2010

/s/Gail E. Smith
Gail E. Smith
1000 Lincoln Rd, Suite #123
Yuba City, CA 95991
530-693-0386

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Compel Opposer's Answers to Applicants First Set of Interrogatories, First Set of Requests For Production of Documents, and Requests For Admissions has been properly served on the OPPOSER via email addressed to ssking@manatt.com & patradmarks@manatt.com on this 8, day of June, 2010.

/s/ Gail E.Smith/
Gail E. Smith PRO SE
1000 Lincoln Rd, Suite #123
Yuba City, CA 95991
530-693-0386

EXHBIT A

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Application Serial No.: 77/520947

For the mark: SHAKE-NGROW

Published: December 16, 2008

OMS Investments, Inc.,)

) Opposition No. 91190654

Opposer,)

) OPPOSER'S OBJECTIONS TO

v.) APPLICANT'S FIRST SET OF

) INTERROGATORIES, APPLICANT'S

Hidden Creations,) FIRST SET OF REQUESTS FOR

) PRODUCTION, AND APPLICANT'S

Applicant.) FIRST SET OF REQUESTS FOR

) ADMISSION

Pursuant to 37 C.F.R. § 2.120 and Rule 405 et seq. of the Trademark Trial and Appeal

Board Manual of Procedure, Opposer OMS Investments, Inc. ("Opposer" or "OMS") hereby

objects to Applicant's First Set of Interrogatories, Applicant's First Set of Requests for

Production and Applicant's First Set of Requests for Admission (collectively, the "Requests"):

OBJECTIONS

1. Opposer objects to these Requests to the extent they purpose to impose obligations upon it in excess of those created by the Federal Rules of Civil Procedure and the Trademark Rules of Practice.

2. Opposer objects to these Requests to the extent they seek documents and materials containing confidential and proprietary business information.

3. Opposer objects to these Requests to the extent they seek disclosure of documents that would violate the privacy interests of third parties.

4. Opposer objects to these Requests to the extent the documents sought are a matter of public record or uniquely within the knowledge of Applicant or other non-parties, or to the extent the documents sought are as readily determinable by Applicant as by Opposer.
5. Opposer objects to these Requests to the extent they seek documents relating to trademark use, registration and/or enforcement activity outside of the United States.
6. In response to these Requests, Opposer does not in any way waive or intend to waive, but rather intends to preserve and is preserving.
 - a. all objections as to competence, relevance, materiality and admissibility of any information or documents that may be produced pursuant to the Requests;
 - b. all objections as to vagueness, ambiguity and undue burden;
 - c. all rights to object on any ground to the use of any information or documents that may be stated or produced herein, or the subject matter of any Requests, in any subsequent proceedings, including the hearing of this or any other related or unrelated action, trial, hearing, case or controversy.
7. Opposer objects to the Requests to the extent they seek documents that contain privileged attorney-client communications, attorney work product, or that are otherwise protected from disclosure.
8. Opposer objects to the extent that Applicant's definition of the term "You" and Your," set forth in the Definitions, is nonsensical, to the extent that this definition refers to Applicant Hidden Creations.
9. Opposer objects to the Requests to the extent they do not identify a specific time period.
10. Opposer objects to the Requests to the extent they seek documents that are not limited in geographic scope to the United States.

11. Opposer objects to these Requests to the extent they call for Opposer to take action other than a reasonably diligent search for information maintained in Opposer's possession, custody, or control responsive to the Requests in the location where such information is most likely to be found and a reasonably diligent inquiry of those persons presently employed by Opposer most likely to have documents responsive to the requests.

12. Opposer objects to these Requests to the extent they call for documents or information that is not within the scope of permissible discovery, information which is not relevant to the subject matter of this action and not reasonably calculated to lead to the discovery of admissible evidence.

13. Opposer objects to these Requests to the extent that they are vague, indefinite, uncertain, ambiguous and/or contain undefined terms and cannot be reasonably answered.

14. Pursuant to Fed. R. Civ. P. 26(e), Opposer reserves its right to supplement, update and amend its responses to these Requests in the future.

Dated: May 3, 2010 //

/ -7

/

By

Shannon S. King
Susan E. Hollander
Shannon S. King
MANATF, PHELPS & PHILLIPS, LLP
1001 Page Mill Road, Bldg. 2
Palo Alto, California 94304
Telephone: (650) 812-1300
Facsimile: (650) 213-0260
Attorneys for Opposer
OMS Investments, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing OPPOSER'S OBJECTIONS TO APPLICANT'S FIRST SET OF INTERROGATORIES,

APPLICANT'S FIRST SET OF REQUESTS FOR PRODUCTION, AND APPLICANT'S FIRST SET OF REQUESTS FOR ADMISSION has been properly served on the Applicant via email addressed to ai Ihiddencreations@corncast.net and hiddencreations@corncast.net on this 3rd day of May, 2010.

//z/2

/__ Aai S.

300093766.1

EXHBIT B

Gail Smith
Hidden Creations
1000 Lincoln Rd. Suite H #123
Yuba City, Ca 95993
530-755-1514

Dated: June 2, 2010

Susan E. Hollander
Shannon S. King
MANATF, PHELPS & PHILLIPS, LLP
1001 Page Mill Road, Bldg. 2
Palo Alto, California 94304
Telephone: (650) 812-1300
Facsimile: (650) 213-0260
Attorneys for Opposer
OMS Investments, Inc.

RE: OMS vs Shake-n-Grow Opposition No.91190654

Ms King,

I am writing in “good faith” a response to your objections to Applicant’s First Set of Interrogatories, Applicant’s First Set of Requests for Production and Applicant’s First Set of Requests for Admission Objections, received on May 3, 2010. My response is in red to your objection.

Opposer’s objection #1 to these requests to the extent they purpose to impose obligations upon it in excess of those created by the Federal Rules of Civil Procedure and the Trademark Rules of Practice.

Please be more specific in your response as Opposer has requested and applicant answered 33 of Applicant’s First Set of Interrogatories and Applicant has requested 29.

Opposer has requested and applicant answered 50 Applicant’s First Set of Requests for Production and Applicant has requested 47.

Opposer has requested and applicant answered 33 Opposer’s First Set of Requests for Admission and Applicant has requested 29.

Opposer objections #2,3,6a-c,7,11-13

Based on your nonresponse to the Applicant's First Set of Interrogatories, Applicant's First Set of Requests for Production and Applicant's First Set of Requests for Admission Objections please reference specific questions.

Opposer's objection #4 objects to the extent the documents sought are a matter of public record or uniquely within the knowledge of Applicant or other non-parties, or to the extent the documents sought are as readily determinable by Applicant as by Opposer.

Opposer had no issues with asking Applicant to respond to same documents and Applicant did so completely and in "good faith".

Regarding objections #5, #10 the Applicant seeks information regarding the U.S. in Applicant's First Set of Interrogatories, Applicant's First Set of Requests for Production and Applicant's First Set of Requests for Admission.

Opposers objection #9 to the Requests to the extent they do not identify a specific time time period to set to answer. Applicant's First Set of Interrogatories, Applicant's First Set of Requests for Production and Applicant's First Set of Requests for Admission dates are set by the USPTO .

Opposers objection #14 pursuant to Fed. R. Civ. P. 26(e), Opposer reserves its right to supplement, update and amend its responses to these Requests in the future. Applicant does not object to Opposer's right to supplement, update and amend its responses; however Applicant reserves the same rights to supplement, update and amend said Interrogatories.

I need a response to the Applicant's First Set of Interrogatories, Applicant's First Set of Requests for Production and Applicant's First Set of Requests for Admission Objections as per section Trademark Rule Fed. R. Civ. P. 26(e). I would like a response within 7 days.

Applicant offers to meet & confer within 7 days. A suitable office in Yuba City, California will be arranged.

Please feel free to contact me if you have any other questions.

Thank you,

/s/Gail Smith

Gail Smith

1000 Lincoln Rd. Suite H #123

Yuba City, Ca 95991

530-755-1514

gailhiddencreations@comcast.net

EXHBIT C

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Application Serial No.: 77/520947

For the mark: SHAKE-N-GROW

Published: December 16, 2008

OMS Investments, Inc.,)

) Opposition No. 91190654

Opposer,)

) APPLICANT FIRST SET OF REQUESTS

v.) FOR ADMISSIONS TO OPPOSER

)

Hidden Creations,)

Applicant.)

_____)
Pursuant to Rules 26 and 36 of the Federal Rules of Civil Procedure and the Trademark Rules of Practice, Applicant, Hidden Creations hereby requests Opposer OMS Investments, Inc. (“OMS”) to answer the following Requests for Admission within thirty (30) days of service hereof.

DEFINITIONS AND INSTRUCTIONS

1. “Applicant,” “you” or “your” means the sole proprietorship Hidden Creations comprised of Gail E. Smith (“Smith”) including but not limited to “Gail’s Hidden Creations,” and includes, without limitation, each of Applicant’s predecessors and successors, parent companies, subsidiaries, and divisions, as well as all directors, officers, employees, agents, distributors, jobbers, salespersons, sales representatives, licensees, franchisees, attorneys and all other persons acting or purporting to act on its or their behalf or under its or their control.
2. “Opposer” means OMS Investments, Inc., and any company under which OMS is doing business under a different name including but not limited to “Scotts” and “Scotts MiracleGro” and includes, without limitation, each of OMS” predecessors and successors, parent

organizations, related groups and divisions, as well as all directors, officers, employees, agents, distributors, jobbers, salespersons, sales representatives, licensees, franchisees, attorneys and all other persons acting or purporting to act on its or their behalf or under its or their control.

3. “SHAKE-N-GROW Mark” means the mark SHAKE-N-GROW, which is the subject of Trademark Application Serial No. 77/520,947, filed on July 16, 2008.

4. “Opposition” means Opposition No. 91190654 entitled, OMS Investments, Inc. v. Hidden Creations.

5. “OMS Marks” means, collectively, the SHAKE „N FEED Marks and the GRO Marks as defined in OMS“ Notice of Opposition filed on June 15, 2009.

6. “Person” has the meaning set forth in 15 U.S.C. § 1127.

7. Any word written herein in the singular shall be construed as plural and vice versa when necessary to facilitate the answer.

REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO.1

Admit that the Applicants rights for the use of the SHAKE-N-GROW Mark were submitted first to the USPTO.

REQUEST FOR ADMISSION NO.2

Admit that Opposer“s rights in the OMS Marks are NOT senior to Applicant“s rights in the SHAKE-N-GROW Mark.

REQUEST FOR ADMISSION NO. 3

Admit that the Applicant SHAKE-N-GROW Mark is uniquely different from the SHAKE N“FEED and MIRACLE GRO Marks and is not the same Mark.

REQUEST FOR ADMISSION NO.4

a feature of the OMS Marks. other persons acting or purporting to act on its or their behalf or under its or their control.

3. “SHAKE-N-GROW Mark” means the mark SHAKE-N-GROW, which is the subject of Trademark Application Serial No. 77/520,947, filed on July 16, 2008.

4. “Opposition” means Opposition No. 91190654 entitled, OMS Investments, Inc. v. Hidden Creations.

5. “OMS Marks” means, collectively, the SHAKE „N FEED Marks and the GRO Marks as defined in OMS“ Notice of Opposition filed on June 15, 2009.

6. “Person” has the meaning set forth in 15 U.S.C. § 1127.

7. Any word written herein in the singular shall be construed as plural and vice versa when necessary to facilitate the answer.

REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO.1

Admit that the Applicants rights for the use of the SHAKE-N-GROW Mark were submitted first to the USPTO.

REQUEST FOR ADMISSION NO.2

Admit that Opposer“s rights in the OMS Marks are NOT senior to Applicant“s rights in the SHAKE-N-GROW Mark.

REQUEST FOR ADMISSION NO. 3

Admit that the Applicant SHAKE-N-GROW Mark is uniquely different from the SHAKE N“FEED and MIRACLE GRO Marks and is not the same Mark.

REQUEST FOR ADMISSION NO.4

Admit that the Opposer does not have an exclusive monopoly on the colors green and yellow as

a feature of the OMS Marks.

REQUEST FOR ADMISSION NO.5

Admit that the Opposer products bearing the SHAKE N“FEED and MIRACLE GRO Marks are not exclusive to the green and yellow color scheme.

REQUEST FOR ADMISSION NO.6

Admit that the Opposer products bearing the SHAKE N“FEED and MIRACLE GRO Marks uses color packaging schemes that are predominately shades of green, yellow, pink, lavender and black.

REQUEST FOR ADMISSION NO.7

Admit that Opposer was aware of many plant and garden products using the green and yellow color scheme for packaging of other plant and garden products as an industry standard.

REQUEST FOR ADMISSION NO.8

Admit that Opposer SHAKEN“FEED and MIRACLE GRO Marks does not have a product label depicting a Victorian House as featured in the SHAKE-N-GROW Mark.

REQUEST FOR ADMISSION NO.9

Admit that the Applicant SHAKE-N-GROW packing and the Opposers SHAKEN“FEED AND MIRACLE GRO packaging are not the same.

REQUEST FOR ADMISSION NO.10

Admit that the Applicant Hidden Creations is a small family business owned by Gail Smith.

REQUEST FOR ADMISSION NO.11

Admit that Applicant Hidden Creations is located in Yuba City, California.

REQUEST FOR ADMISSION NO.12

Admit that the Applicant provides a plant food **supplement** that is not an all purpose plant food.

REQUEST FOR ADMISSION NO.13 Admit that Opposer customers do not view the Applicant as a competitor or potential competitor.

REQUEST FOR ADMISSION NO.14

Admit that the Opposer views Applicant in no way as a competitor or potential competitor.

REQUEST FOR ADMISSION NO.15

Admit that Applicant is the owner of the SHAKE-N-GROW Mark.

REQUEST FOR ADMISSION NO.16

Admit that Applicant provides a plant food **supplement** under the SHAKE-N-GROW Mark.

REQUEST FOR ADMISSION NO.17

Admit that Applicant's SHAKE-N-GROW product does not compete directly with Opposer's SHAKE N'FEED and MIRACLE GRO products.

REQUEST FOR ADMISSION NO.18

Admit that the Applicant is a small start up business in the lawn and garden industry.

REQUEST FOR ADMISSION NO.19

Admit that Applicant's and Opposer's consumers or potential consumers are unlikely to overlap.

REQUEST FOR ADMISSION NO.20

Admit that all documents produced in response to Applicants First Set of Requests for production of Documents and in response to Applicant's First Set of Interrogatories are authentic.

REQUEST FOR ADMISSION NO.21

Admit that all documents produced in response to Applicant's First Set of Requests for Production of Documents and in response to Applicant's First Set of Interrogatories are true and correct copies of the originals.

REQUEST FOR ADMISSION NO.22 Admit that all documents produced in response to Applicant's First Set of Requests for

Production of Documents and in response to Applicant's First Set of Interrogatories are admissible into evidence.

Dated: April 2, 2010

By: _____

Admit that all documents produced in response to Applicant's First Set of Requests for Production of Documents and in response to Applicant's First Set of Interrogatories are admissible into evidence.

Dated: April 2, 2010

By: _____

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Application Serial No.: 77/520947

For the mark: SHAKE-N-GROW

Published: December 16, 2008

OMS Investments, Inc.,)

) Opposition No. 91190654

Opposer,)

) APPLICANTS FIRST SET OF

v.) INTERROGATORIES TO OPPOSER

)

Hidden Creations,)

)

Applicant.)

_____)

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure and the Trademark Rules of Practice,

Applicant Hidden Creations hereby requests that Opposer OMS Investments, Inc (“OMS”) answer the following interrogatories fully and under oath within thirty (30) days of service hereof.

DEFINITIONS AND INSTRUCTIONS

1. “Applicant,” “You” or “Your” means the sole proprietorship Hidden Creations comprised of Gail E.

Smith and includes, without limitation, each of Opposer predecessors and successors, parent companies,

subsidiaries, and divisions, as well as all directors, officers, employees, agents, distributors, jobbers,

salespersons, sales representatives, licensees, franchisees, attorneys and all other persons acting or

purporting to act on its or their behalf or under its or their control.

2. “Opposer” means OMS Investments, Inc., and any company under which OMS is

doing business under a different name, including but not limited to “Scotts” and “Scotts MiracleGro,”

and includes, without limitation, each of OMS” predecessors and successors, parent organizations, related

groups and divisions, as well as all directors, officers, employees, agents, distributors, jobbers,

salespersons, sales representatives, licensees, franchisees, attorneys and all other persons acting or

purporting to act on its or their behalf or under its or their control.

3. “SHAKE-N-GROW” means the mark “SHAKE-N-GROW”, which is the subject of Trademark

Application Serial No. 77/520,947, filed on July 16, 2008.

4. "Trade Dress" means the overall appearance of the packaging for a product.
5. "Opposition" means Opposition No. 91190654 entitled, OMS Investments, Inc. v. Hidden Creations.
6. "OMS Marks" means, collectively, the SHAKE „N FEED and MIRACLE GRO Marks and the GRO Mark as defined in OMS" Notice of Opposition filed on June 15, 2009.
7. "Person" has the meaning set forth in 15 U.S.C. § 1127.
8. "Identify," when used herein with respect to a person, means to supply the following information separately as to each person:

If a natural person:

- (a) state the natural person"s full name;
- (b) state the business position/title of such person at the relevant time;
- (c) state the employer of such person at the relevant time;
- (d) state the business address of such person at the relevant time;
- (e) state the present or last known business position/title of such person;
- (f) state the last known or present employer of such person;
- (g) state the last known or present business address and telephone number of such person; and
- (h) state the last known or present home address and telephone number of such person.

If a juristic person:

- (a) state the person"s full name;
- (b) state the state, territory, or country in which the person was organized and/or under whose laws it was formed or exists;
- (c) state the nature of the business entity (i.e., form);
- (d) state the business address at the relevant time; and
- (e) state the last known or present business address and telephone number.

9. "List" or "identify," with respect to documents, means to supply the following information separately as to each document:

- (a) the type of document (e.g., letter, notebook, etc.) and the number of pages of which it consists;

- (b) the date of the document, if any; if no date appears, the answer shall so state and shall supply the date or approximate date that such document was prepared;
- (c) the date on which the document came into Opposer possession or control;
- (d) the names and titles of the persons who signed the document; if not signed, the answer shall so state and supply the names and titles of the persons who prepared the document, if known, or, if not known, the answer shall so state;
- (e) the names and titles of the persons to whom the document is addressed and to whom copies were furnished (whether specifically named therein or not);
- (f) the business entity or entities with which each person was associated at the date of the preparation of the document;
- (g) the present whereabouts of the document and the name and address of the custodian thereof; and
- (h) a brief summary of the subject matter of the document.

10. "Document" or "documents" shall have the full meaning ascribed to it in Rule 34 of the Federal Rules of Civil Procedure, and refers to all handwritten, typed, printed, or otherwise visually, mechanically, or electronically reproduced materials, whether copies or originals, in the possession, custody or control of Applicant or its officers, agents, employees, consultants or attorneys, including but not limited to labels, letters, e-mails, cables, memoranda, intracorporate communications, reports, notes, minutes, bulletins, circulars, instructions, work assignments, invoices, recordings, sketches, drawings, charts, photographs, prints, artwork, designs, drafts, work sheets, printouts, information stored in computers or other information retrieval systems, other non-paper information storage means such as tape or film, agreements, published material of any kind, annual reports, and advertising or promotional literature. Where a copy of a document contains any marking not appearing on the original or is altered from the original, then such item shall be considered to be a separate original document.

11. Any word written herein in the singular shall be construed as plural and vice versa when necessary to facilitate the answer to a discovery request.

12. “And” and “or” shall be construed disjunctively or conjunctively as plural and vice versa when necessary to facilitate the answer to a discovery request.

13. Pursuant to Federal Rule of Civil Procedure 33, in lieu of describing or identifying a document, you may produce a copy of that document and identify the interrogatory to which it is furnished in response.

14. If a claim of privilege is made as to any information or document responsive to an interrogatory herein, identify such information or document in your response to such interrogatory, and for each such item, identify, as applicable, the (i) date created or conceived; (ii) authors, addressees, and recipients; (iii) persons now in possession of the item; (iv) basis as to the claim of privilege as to each item; and (v) the subject matter, and provide a summary of the information or document for which a privilege is claimed, and produce those portions of the information or document not subject to the claimed privilege.

15. If any information responsive to an interrogatory herein was in a document, which at one time was in existence, but has been lost, destroyed, discarded or otherwise disposed of, identify such document as completely as possible, providing as much of the following information as possible: (i) the type of document; (ii) its date; (iii) its authors, addressees, and recipients; (iv) the subject matter of the document; (v) the approximate date of disposal; (vi) the reasons for disposing of or discarding the document; (vii) the person authorizing the disposal; (viii) the person disposing of the document or other physical evidence; and (ix) the identity of any person with knowledge of the contents thereof.

16. If you cannot answer an interrogatory in full after exercising due diligence to secure the information, so state and answer to the extent possible, specifying your inability to answer the remainder and stating whatever information or knowledge you have concerning the unanswered portions. The fact that a full answer cannot be given is not a basis for you to fail to provide such information as is available to you at the time of your response to these interrogatories.

17. These interrogatories are continuing and impose upon Applicant the obligations stated in Rule 26(a) of the Federal Rules of Civil Procedure.

INTERROGATORIES

INTERROGATORY NO. 1

For each interrogatory propounded by Applicant, identify (by name, address, telephone number) each and every person who answered, assisted in answering, or was consulted in preparing the answers to each interrogatory and the corresponding interrogatory number.

INTERROGATORY NO. 2

Describe Opposers business, including its line of business, product offerings, organizational structure, key individuals involved, total number of employees (if any) and gross revenues since beginning operations.

INTERROGATORY NO. 3

State Opposer current assets and liabilities to the nearest hundred dollars.

INTERROGATORY NO. 4

Describe the process by which Applicant selected the SHAKE N"FEED & MIRACLE GRO Marks, and identify all persons who participated in the process of selecting the SHAKE N"FEED & MIRACLE GRO Marks.

INTERROGATORY NO. 5

Describe how and when Opposer first learned of the SHAKE-N-GROW Mark.

INTERROGATORY NO. 6

Identify any search or investigation of any records such as, but not limited to, the United States Patent and Trademark Office ("USPTO") records, state trademark records, trademark or trade publications, business directories, or the records of any trademark service organization,

conducted by Opposer or on the Opposers behalf prior to the adoption and use of the SHAKE N^oFEED & MIRACLE GRO Marks.

INTERROGATORY NO.7

Identify any and all goods and services bearing the SHAKE N^oFEED & MIRACLE GRO Marks which have been advertised, distributed or offered for sale at any time by Opposer.

INTERROGATORY NO.8

For all goods and services identified in response to Interrogatory No. 7, state the dates during which each such item or service has been advertised, distributed or offered for sale.

INTERROGATORY NO.9

State the number of units of sales for each of the goods and/or services identified in response to Interrogatory No. 7, for each month since each such good or service was introduced.

INTERROGATORY NO.10

State, to the nearest whole dollar, the revenues received from the sales of each of the goods and/or services identified in response to Interrogatory No. 7, for each month since each such good or service was introduced.

INTERROGATORY NO.11

State, to the nearest whole dollar, the profits received from the sales of each of the goods and/or services identified in response to Interrogatory No. 7, for each month since each such good or service was introduced.

INTERROGATORY NO.12

Identify all websites operated by Opposer or on Opposer's behalf which advertise or promote the SHAKE N^oFEED & MIRACLE GRO Marks, including when each such domain name was registered and when SHAKE N^oFEED & MIRACLE GRO each such website first published

content.

INTERROGATORY NO.13

Describe with particularity the channels of trade, including Internet channels, through which each good or service identified in response to Interrogatory No. 7 were, are or are intended to be distributed or offered for sale, including representative outlets for each channel identified.

INTERROGATORY NO.14

Describe the intended consumers or users of each good or service identified in response to Interrogatory No. 7.

INTERROGATORY NO.15

State the typical retail price for each good or service identified in response to Interrogatory No. 7.

INTERROGATORY NO.16

Identify the geographic scope of Opposer's use of the SHAKE N'FEED & MIRACLE GRO Marks, including the locations of each of Opposer's customers and where Opposer has advertised each good or service identified in response to Interrogatory No. 7.

INTERROGATORY NO.17

Identify, by month and year, Opposer expenditures to date on advertising of each good or service identified in response to Interrogatory No. 7.

INTERROGATORY NO.18

Describe in detail any intention or plans to expand or modify Opposer use of the SHAKE N'FEED & MIRACLE GRO Marks, including but not limited to any plans to use the marks for additional goods or services.

INTERROGATORY NO.19 8

For each good identified in response to Interrogatory No. 7, describe in detail the process by which Opposer selected the Trade Dress, including when, where, why and how it was created and identifying each label and/or packaging that has been used since each such good was introduced.

INTERROGATORY NO.20

Identify all Persons, outside agencies and/or firms responsible for, or who participated in, the conception, creation, development or design of the Trade Dress for each good identified in response to Interrogatory No. 7.

INTERROGATORY NO.21

Identify every third party known to Opposer what you contend is currently using, or permitted to use, any mark containing the term “SHAKE” with “-N-“, “GRO” or “GROW” and, for each such party, state or describe the mark and the goods or services with which the mark is being used.

INTERROGATORY NO.22

Identify every third party known to Opposer that you contend is currently using, or permitted to use, a predominantly green and yellow color scheme for the packaging of lawn and garden related products.

INTERROGATORY NO.23

Identify any witness Opposer to testify on its behalf and the nature of the testimony to be given by the witness during Opposer testimony period.

INTERROGATORY NO.24

Describe in detail each of the reasons Opposer began using the SHAKE N” FEED AND MIRACLE GRO Mark.

INTERROGATORY NO.25

Describe in detail each of the reasons Opposer adopted a predominantly green and yellow color

scheme for the packaging of its products bearing the SHAKE N" FEED AND MIRACLE GRO Marks.

INTERROGATORY NO.26

Identify (by name and address) all stores or other retailers that sell to ultimate consumers or end users any product bearing the SHAKE N" FEED AND MIRACLE GRO Marks.

INTERROGATORY NO. 27

Identify (by name and address) all distributors or other wholesalers that distribute or sell any product bearing the SHAKE N" FEED AND MIRACLE GRO Marks.

INTERROGATORY NO. 28

Identify with particularity any and all instances of confusion that have occurred between Opposer goods and "SHAKE-N-GROW"and/or the SHAKE N" FEED AND MIRACLE GRO Marks and any of the OMS Marks.

INTERROGATORY NO.29

Except for the current Opposition, describe every legal challenge involving the SHAKE N"FEED & MIRACLE GRO Marks or products bearing the SHAKE N" FEED AND MIRACLE GRO Marks, including lawsuits, arbitrations, and/or administrative proceedings, letters or other threats of legal action. Your description should include the parties to the dispute, a general description of the issues involved, and the outcome of the dispute.

Dated: April 2, 2010

By: _____

Gail E. Smith
1000 Lincoln Rd, Suite #123
Yuba City, CA 95991
530-693-0386 10

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing APPLICANT'S FIRST SET OF INTERROGATORIES has been properly served on the OPPOSER via email addressed to ssking@manatt.com and patradmarks@manatt.com on this 2st day of April, 2010.

Gail Smith

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing APPLICANTS FIRST SET OF REQUESTS FOR ADMISSION has been properly served on the Opposer via email addressed to ssking@manatt.com and trademarks@manatt.com 2nd day of April 2010.

Gail Smith

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Application Serial No.: 77/520947

For the mark: SHAKE-N-GROW

Published: December 16, 2008

OMS Investments, Inc.,)

) Opposition No. 91190654

OPPOSER,)

) APPLICANT FIRST SET OF REQUESTS

v.) FOR PRODUCTION TO OPPOSER

)

Hidden Creations,)

)

Applicant.)

_____)
Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure and the Trademark Rules of Practice,

Applicant Hidden Creations hereby requests that Opposer OMS Investments, Inc. (“OMS”) produce for inspection and copying each of the documents and things identified below within thirty (30) days of service hereof.

DEFINITIONS AND INSTRUCTIONS

1. “Applicant,” “You” or “Your” means the sole proprietorship Hidden Creations comprised of Gail E.

Smith and includes, without limitation, each of Applicant’s predecessors and successors, parent

companies, subsidiaries, and divisions, as well as all directors, officers, employees, agents, distributors,

jobbers, salespersons, sales representatives, licensees, franchisees, attorneys and all other persons acting

or purporting to act on its or their behalf or under its or their control.

2. “Opposer” means OMS Investments, Inc., and any company under which OMS is doing business under

a different name, including but not limited to “Scotts” and “Scotts MiracleGro” and includes, without

limitation, each of OMS’ predecessors and successors, parent organizations, related groups and divisions,

as well as all directors, officers, employees, agents, distributors, jobbers, salespersons, sales

representatives, licensees, franchisees, attorneys and all other persons acting or purporting to act on its or

their behalf or under its or their control.

3. “SHAKE-N-GROW Mark” means the mark SHAKE-N-GROW, which is the subject of Trademark Application Serial No. 77/520,947, filed on July 16, 2008.

4. “Opposition” means Opposition No. 91190654 entitled, OMS Investments, Inc. v. Hidden Creations.

5. “OMS Marks” means, collectively, the SHAKE „N FEED Marks and the GRO Marks as defined in OMS“ Notice of Opposition filed on June 15, 2009.

6. “Person” has the meaning set forth in 15 U.S.C. 1127.

7. “Document” or “documents” shall have the full meaning ascribed to it in Rule 34 of the Federal Rules of Civil Procedure, and refers to all handwritten, typed, printed, or otherwise visually, mechanically, or electronically reproduced materials, whether copies or originals, in the possession, custody or control of Applicant or its officers, agents, employees, consultants or attorneys, including but not limited to labels, letters, e-mails, cables, memoranda, intracorporate communications, reports, notes, minutes, bulletins, circulars, instructions, work assignments, invoices, recordings, sketches, drawings, charts, photographs, prints, artwork, designs, drafts, work sheets, printouts, information stored in computers or other information retrieval systems, other non-paper information storage means such as tape or film, agreements, published material of any kind, annual reports, and advertising or promotional literature. Where a copy of a document contains any marking not appearing on the original or is altered from the original, then such item shall be considered to be a separate original document.

8. Any word written herein in the singular shall be construed as plural and vice versa when necessary to facilitate the answer to a discovery request.

9. “And” and “or” shall be construed disjunctively or conjunctively as plural and vice versa when necessary to facilitate the answer to a discovery request.

10. If a claim of privilege is made as to any document responsive to a request herein, state the following for each such document: the (i) date created or conceived; (ii) authors, addressees, and recipients; (iii)

persons now in possession of the item; (iv) basis as to the claim of privilege as to each item; and (v) the subject matter, and provide a summary of the document for which a privilege is claimed, and produce those portions of the document not subject to the claimed privilege.

11. If any document responsive to a request herein was at one time was in existence, but has been lost, destroyed, discarded or otherwise disposed of, identify such document as completely as possible, providing as much of the following information as possible: (i) the type of document; (ii) its date; (iii) its authors, addressees, and recipients; (iv) the subject matter of the document; (v) the approximate date of disposal; (vi) the reasons for disposing of or discarding the document; (vii) the person authorizing the disposal; (viii) the person disposing of the document or other physical evidence; and (ix) the identity of any person with knowledge of the contents thereof.

12. These requests are continuing and impose upon Applicant the obligations stated in Rule 26(a) of the Federal Rules of Civil Procedure.

DOCUMENTS AND THINGS TO BE PRODUCED

Please produce the following documents and things:

1. All documents identified, referred to or depended upon in responding to Applicant First Set of Interrogatories served herewith.
2. All documents identified, referred to or depended upon in responding to Applicant First Set of Requests for Admission served herewith.
3. Documents sufficient to identify all names under which Opposer does business relating to the SHAKE N[®]FEED and MIRACLE GRO Marks.
4. Documents sufficient to identify Applicant's organizational structure.
5. Documents sufficient to identify the address, including any website address, of each location operated by Opposer in which goods or services bearing the SHAKE N[®]FEED and MIRACLE GRO Marks were, are or are intended to be sold.
6. Documents sufficient to identify use of any variation of the SHAKE N[®]FEED and MIRACLE GRO 4

Marks, including variations in the spelling in any advertisements, brochures and/or websites, and all documents which refer or relate to the reason for any such variation of the SHAKE N"FEED and MIRACLE GRO Marks.

7. One sample of each good or service identified in response to Interrogatory No. 7 of Applicant's First Set of Interrogatories, including any and all labeling, packaging and product information therefore.

8. One copy of each label, tag, sticker, container, packaging ,point of sale display, signage, brochure, catalog or other material bearing the SHAKE N"FEED and MIRACLE GRO Marks.

9. All documents, including online literature, describing any goods or service identified in response to Interrogatory No. 7 of Applicant's First Set of Interrogatories.

10. All documents that reflect the channels of trade in which Opposer distributes or sells products bearing the SHAKE N"FEED and MIRACLE GRO Marks.

11. All documents that reflect any instances of actual confusion that have occurred between Opposer goods (OMS) and Hidden Creations goods or SHAKE N"FEED and MIRACLE GRO Marks and any of the Hidden Creation Mark.

12. Documents sufficient to identify all ways in which Opposer has used, currently uses, or intends to use the SHAKE N"FEED and MIRACLE GRO Marks.

13. Documents sufficient to show any and all use by Opposer of a trademark other than the SHAKE N"FEED and MIRACLE GRO Marks in connection with the goods or services identified in response to Interrogatory No. 7 of Applicant's First Set of Interrogatories.

14. All documents identifying Opposer advertising or promotion expenditures for each good or service identified in response to Interrogatory No. 7 of Applicants First Set of Interrogatories, for each month since such good or service was introduced.

15. All documents identifying the number of units sold for each good or service identified in response to Interrogatory No. 7 of Applicants First Set of Interrogatories, for each month since such good or service was introduced.

16. All documents referring or relating to any customer complaints received by Opposer for the goods or services identified in response to Interrogatory No. 7 of Applicants First Set of Interrogatories.
17. All documents identifying the revenues derived from the sales of each good or service identified in response to Interrogatory No. 7 of Applicants First Set of Interrogatories, for each month such good or service was introduced.
18. All documents identifying the profits derived from the sales of each good or service identified in response to Interrogatory No. 7 of Applicants First Set of Interrogatories, for each month such good or service was introduced.
19. All documents identifying every sale of goods or services under the SHAKE N[®]FEED and MIRACLE GRO Marks, including but not limited to invoices, purchase orders, receipts, bills of sale, sales summaries and state and/or federal tax filings for each month since Opposer first use anywhere of the SHAKE N[®]FEED and MIRACLE GRO Marks.
20. All documents referring or relating to any current intention or plans to use the SHAKE N[®]FEED and MIRACLE GRO Marks on goods or services other than those goods or services identified in response to Interrogatory No. 7 of Applicants First Set of Interrogatories.
21. Documents sufficient to identify each person or outside agency that has assisted Opposer in the advertising, promotion, distribution or sale of any good or service bearing the SHAKE N[®]FEED and MIRACLE GRO Marks.
22. One copy of each advertisement and/or commercial created by Opposer or on Opposer behalf to promote the SHAKE N[®]FEED and MIRACLE GRO Marks or any good or service bearing the SHAKE N[®]FEED and MIRACLE GRO Marks, whether in print, video, audio or electronic format, including but not limited to flyers, brochures, newsletters, coupons, websites, Internet pop-up ads, or written copy relating to advertising, posters or point of sale displays.
23. All press, including but not limited to articles from newspapers, magazines, third party websites, or any other publications, whether distributed in print, broadcast or electronic form, not prepared or solicited by Opposer or on Opposer's behalf, which refer or relate to, discuss, mention or concern the SHAKE

N“FEED and MIRACLE GRO Marks.

24. Documents sufficient to show the geographic scope of Opposer advertising and promotional activities relating to the SHAKE N“FEED and MIRACLE GRO Marks.

25. A sample of each catalog, price list, webpage or other publication where the availability and/or price of any good or service identified in response to Interrogatory No. 7 of Applicants First Set of Interrogatories was or is advertised or made known.

26. A complete printout of each website identified in response to Interrogatory No. 12 of Applicants First Set of Interrogatories.

27. All documents that refer or relate to any plans to advertise, promote or market any products under the SHAKE N“FEED and MIRACLE GRO Marks.

28. All Your actual or prospective customer lists and mailing lists, including email lists.

29. Documents sufficient to identify the intended customers or users for each of the goods or services identified in response to Interrogatory No. 7 of Applicants First Set of Interrogatories.

30. All documents referring or relating to any search or investigation of records, including but not limited to the United States Patent & Trademark Office records, state trademark records, trademark or trade publications, business directories or the records of any trademark service organization, conducted at any time in connection with the SHAKE N“FEED and MIRACLE GRO Marks.

31. All documents that refer or relate to any opinion, including any opinion by legal counsel, as to the availability of the SHAKE N“FEED and MIRACLE GRO Marks as a trade name or trademark.

32. All documents referring or relating to any outside vendors, such as suppliers or packagers, which Opposer used in connection with manufacturing any of the goods or services identified in response to Interrogatory No. 7 of Applicants First Set of Interrogatories.

33. All documents referring or relating to any outside party, such as graphic designers, which Opposer used in connection with creating or preparing any container, label, sticker, tag, or any other packaging used in connection with any good identified in response to Interrogatory No. 7 of Applicants First Set of

Interrogatories.

34. All documents which refer or relate to Opposer first knowledge of Hidden Creations rights in and to the SHAKE-N-GROW Mark.
35. All communications between Opposer and Hidden Creations.
36. All communications between Opposer and any third party relating to the SHAKE N"FEED and MIRACLE GRO Marks or any of the Hidden Creation Marks.
37. All documents referring or relating to Applicant.
38. All documents referring or relating to the SHAKE-N-GROW Mark or Applicants goods or services.
39. All documents which refer or relate to Opposer conception, selection process, and/or adoption of the SHAKE N"FEED and MIRACLE GRO Marks.
40. All documents which refer or relate to Opposer conception, selection process, and/or adoption of the packaging used for products bearing the SHAKE N"FEED and MIRACLE GRO Marks.
41. All documents which refer or relate to any marketing study, survey or public opinion poll concerning either the SHAKE N"FEED and MIRACLE GRO Marks or the OMS Marks, or both.
42. All documents which refer or relate to any instance of actual confusion, mistake or deception as to source or origin of goods or services sold under the SHAKE N"FEED and MIRACLE GRO Marks and goods or services sold under the OMS Marks, or as to association or affiliation of goods or services sold under the SHAKE N"FEED and MIRACLE GRO Marks with those sold under the Hidden Creations Mark.
43. All documents referring or relating to Application Serial No. 77/520947 which is the subject of this Opposition, including the file history.
44. All documents referring or relating to any name, trademark, domain name or other designation which Opposer uses, has ever used or intends to use, other than the SHAKE N"FEED and MIRACLE GRO Marks which contains the term "SHAKE", -N-, together with the term "GRO" or "GROW."
45. Documents sufficient to identify every state in the U.S. in which Opposer has made sales of goods or services bearing the SHAKE N"FEED and MIRACLE GRO Marks.

46. All documents and things upon which Opposer intends to rely on in order to demonstrate that there is no likelihood of confusion between the SHAKE-N-GROW Mark and the SHAKE N"FEED and MIRACLE GRO Marks.

47. To the extent not already produced, all documents and things the Opposer intends to rely on at trial in this proceeding.

Dated: April 2, 2010 7

By: _____

Gail E. Smith
1000 Lincoln Rd SuiteH #123
Yuba City, CA 95993
530-693-0386 9

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing APPLICANT'S FIRST SET OF REQUESTS FOR PRODUCTION has been properly served on the Opposer via email addressed to ssking@manatt.com and patrademarks@manatt.com on this 31st day of April 2, 2010.

Gail E. Smith